83-692



No. ..-....
IN THE

# Supreme Court of the United States

October Term, 1983

LOCAL UNION NO. 47, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

*Petitioner,*

*vs.*

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; SOUTHERN CALIFORNIA EDISON COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION.

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## Question Presented.

Whether a state agency that regulates the rates private utility companies may charge to consumers has the authority to influence the collective bargaining negotiations between a utility company and the union representing its employees by projecting, for ratemaking purposes, a reasonable level of wage increase.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; SOUTHERN CALIFORNIA EDISON COMPANY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION.

Petitioner Local Union No. 47, International Brotherhood of Electrical Workers, AFL-CIO ("the Union") respectfully prays that a writ of certiorari issue to review the decision of respondent Public Utilities Commission of the State of California ("the PUC") entered in this proceeding.

### Opinion Below.

That portion of the decision of the PUC which treats the issues relevant to this petition for writ of certiorari appears as Exhibit "A" in the Appendix to this brief. Because the full PUC decision is voluminous and the cost of reproduction would be prohibitive, we have filed a motion to dispense with the printing of the full decision, and we have filed 10 photocopies of the full decision therewith.

The appropriate method of securing review of a PUC decision is the application to the California Supreme Court for a writ of certiorari. Cal. Pub. Util. Code § 1756. Within 30 days after the PUC's denial of the Union's application for rehearing in this case (Appendix, Exh. "B"), the Union filed its petition for writ of certiorari with the California Supreme Court. The order of the California Supreme Court denying the Union's petition for writ of certiorari appears as Exhibit "C" in the Appendix to this brief.

**Jurisdiction.**

The PUC's decision in this case was issued on December 13, 1982. The Union's timely application for rehearing before the PUC was denied in an order issued on March 16, 1983. A timely petition for writ of certiorari was denied by the California Supreme Court on July 27, 1983, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

**Statutory Provisions Involved.**

Sections 7 and 8 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 and 158.

**Statement of the Case.**

The Union is a labor organization which has been certified by the National Labor Relations Board as the exclusive representative for purposes of collective bargaining of certain of the employees of respondent Southern California Edison Company ("the Company").

The Company is a privately owned utility which operates facilities in and outside of California in order to furnish electricity to residents of California. The PUC is a public agency of the State of California and regulates the rates that may be charged by the Company for the electricity sold.

In 1981, the Company applied to the PUC for a rate increase. Following hearings, the PUC acted on that increase in its Decision 82-12-055 (Appendix, Exh. "A").[1] The PUC estimated the wage increase the Company would negotiate with the Union, and the rate increase the PUC allowed the Company was in part established as a function of the projected wage increase.

The PUC estimated that for the year 1983, the "labor escalation rate" (wage increase) could be 6.1%; and in subsequent negotiations the Company refused to grant wage increases above that amount.

The Union filed a timely application for rehearing with the PUC, alleging for the reasons set out in this petition that the PUC's decision was illegal and beyond its jurisdiction. That application was denied on March 16, 1983 (Appendix, Exh. "B"). Within 30 days thereafter, the Union applied to the California Supreme Court for a writ of certiorari, again alleging for the reasons set out in this petition that the PUC's decision was illegal and beyond its jurisdiction. The California Supreme Court denied the Union's petition for writ of certiorari on July 27, 1983 (Appendix, Exh. "C").

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[1]The only portion of the PUC's 265 page decision which concerns the issue of the projected reasonable level of wage increase for Union-represented employees is § IV(C)(3) of the Decision, pp. 31-34 (Appendix, Exh. "A").

## REASONS FOR GRANTING THE WRIT.

### A. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AS TO THE PERMISSIBLE SCOPE OF STATE REGULATION OF ACTIVITY TOUCHING UPON LABOR-MANAGEMENT RELATIONS.

"The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.' *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 187 (1978)." *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 527 (1979). Because Congress refrained from defining those limits, the Court "must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner v. Teamsters*, 346 U.S. 485, 488 (1953).

In carrying out its task of statutory interpretation, the Court has established two doctrines for determining whether state regulations are preempted. "Under the first, set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the [National Labor Relations] Act." *Belknap, Inc. v. Hale*, ___ U.S. ___ (1983). The *Garmon* preemption doctrine is not at issue here.

"The second preemption doctrine, set out in *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated. . . ." *Belknap, Inc. v. Hale, supra*, ___ U.S. at ___. In the decision below, the PUC impermissibly regulated the level of wage increase applicable to Edison's Union-represented employees, a matter that Congress in-

tended to leave, and that the decisions of this Court require be left, to the free play of economic forces between labor and management. Thus, the PUC's action is preempted under *Machinists*.

**1. This Court Has Held That Congress Implicitly Intended to Leave the Process of Collective Bargaining to the Free Play of Economic Forces.**

In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Court held preempted the action of the Wisconsin Employment Relations Commission declaring unlawful the union's policy, formulated during stalled negotiations for a new collective bargaining agreement, to prohibit its members from working overtime. In doing so, the Court held that even though the no-overtime weapon was neither specifically approved nor specifically outlawed by Congress, Wisconsin had impermissibly sought to alter "the balance of power between labor and management expressed in our national labor policy." *Id.* at 149 (quoting *Teamsters v. Morton*, 377 U.S. 252, 260 (1964)). Thus, Wisconsin had "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced." *Id.* (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1960)). Both the states and the National Labor Relations Board are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power." *Id.* at 149-50 (quoting *Insurance Agents, supra*, 361 U.S. at 497).

The *Machinists* preemption analysis, and its emphasis upon the Congressional intent to leave the bargaining process to the free play of economic forces, has as its antecedent the Court's decision in *Local 24, Teamsters v. Oliver*, 358 U.S. 283, 295 (1959), in which the Court held that federal

labor policy preempted an Ohio antitrust law which would have upset the terms of a collective bargaining agreement negotiated according to the procedures established under the NLRA. In so holding, the Court noted:

> "The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves. . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Id.* at 295-96.

In *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), the Court returned emphatically to the theme that there should be neither governmental control of, nor concern with the substantive terms of any collective bargaining agreement. Citing *Oliver, supra*, the Court noted that apart from the requirement that the parties negotiate in good faith, "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.* at 488. In holding that the NLRB may not infer a lack of good faith from the use of lawful economic weapons for the purpose of exerting pressure during bargaining, the Court cautioned against unwarranted governmental intrusion into the bargaining process, noting that "[o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations." *Id.* at 490.

In short, "[t]he federal regulatory scheme (1) protects some activities . . ., (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The Court has made it clear that negotiation of the

substantive terms of the collective bargaining agreement, in this case wages, was left by Congress to be controlled by the free play of economic forces.

**2. The Decision Below Not Only Inhibits the Free Negotiation of Wages, It Effectively Removes the Issue of Wages From the Collective Bargaining Process.**

The decision below imposes a greater burden upon the collective bargaining process than federal law permits and would, if allowed to stand, cause a radical restructuring of the collective bargaining process.

The collective bargaining process, as envisioned by Congress, requires that "the employer and the representative of the employees . . . meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . [and execute] a written contract incorporating any agreement reached. . . ." 29 U.S.C. § 158(d).

Under the NLRA, the participants in collective bargaining are the employer and the union. Were the PUC to have its way, the employer would be relegated to the status of an interested observer, with the union making its appeal for improvements in wages and benefits not to the employer but to the Commission; not at the bargaining table but at counsel table during the course of an administrative hearing at which the level of reasonable increase in wages and benefits would be litigated.

Once the PUC determines the level of reasonable wage and benefit increases, what is left for the affected union to do at the bargaining table? Should the union seek to persuade the employer to raise wages to a level higher than that deemed reasonable by the PUC? The union would have to encourage the employer to risk a future reduction in share-

holders' dividends if the PUC decides (because it earlier determined that a particular level of increase was reasonable) to not allow a rate adjustment to offset the higher cost of the wage and benefit increase. Congress, in enacting the NLRA, did not envision that the collective bargaining process would be reduced to such a futile exercise.

Nor does the PUC scheme leave room for the free play of economic forces. If the affected union now must direct its appeal for increases in wages and benefit to the PUC, when, how, and against whom does it engage in economic activity? Do the employees strike before or after the PUC determines the reasonable level of wage and benefit increases? By injecting itself into the collective bargaining process, the PUC seeks to alter the statutory scheme designed by Congress to promote industrial peace and stability through free and unhindered collective bargaining. Such conduct not only conflicts with this Court's consistent rejection of governmental control of the substantive terms of collective bargaining agreements, it risks disruption of the peace and stability of which the utility consumer has been the chief beneficiary.

**B. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE COURTS OF APPEALS AS TO THE PERMISSIBLE SCOPE OF STATE REGULATION OF ACTIVITY TOUCHING UPON LABOR-MANAGEMENT RELATIONS.**

The decision below not only conflicts with the decisions of this Court as to the permissible scope of state regulation of activity touching upon labor-management relations, it conflicts with the decisions of the courts of appeals that have considered these issues.

In *General Electric Co. v. Callahan*, 294 F.2d 60 (1st Cir. 1961), the court held that a Massachusetts law allowing the state's Board of Conciliation and Arbitration to inves-

tigate a threatened labor dispute and to seek voluntary mediation and conciliation was an impermissible intrusion upon the independence of the bargaining parties to engage in bargaining free from government interference. *Id.* at 67.

The Massachusetts law provided that the Board of Conciliation and Arbitration could, after investigation, issue a public report that identified which of the parties was responsible for the existing impasse in negotiations. Notwithstanding that the Board's conclusion was not binding on either party, the court held that such conclusions infringe on the bargaining process because they are coercive:

> "The obvious statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties. The conflict between state and federal policy is obvious." *General Electric Co. v. Callahan*, 294 F.2d 60, 67 (1st Cir. 1961).

The holding in *General Electric Co. v. Callahan* was followed in *Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964), a case involving an Oklahoma statute which also empowered the state's Board of Arbitration and Conciliation to investigate and make recommendations for the settlement of differences between unions and employers. The Oklahoma law was held preempted because it interfered with the bargaining relationship between unions and employers and was thus coercive. *Id.* at 66.[2] *Accord, Delaware Coach Co. v. Public*

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[2]In *Oil, Chemical & Atomic Workers v. Arkansas Louisana Gas Co.*, 332 F.2d 64 (10th Cir. 1964), the employer was a public utility. Employees of privately owned public utilities are accorded the same protection and rights as are all other employees covered by federal labor law. *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 392-93 (1951); *see also Division 1287, Amalgamated Ass'n of Street Employees v. Missouri*, 374 U.S. 74, 80-81 (1963).

*Service Commission*, 265 F. Supp. 648, 654 (D. Del. 1967) (Delaware Public Service Commission enjoined from conducting hearing on revocation of bus company's certificate of public convenience because alleged suspension of bus service was due to a labor dispute; therefore, federal labor law preempted state action which may have interfered with collective bargaining process); *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667, 672 (W.D. Mich. 1955) (Michigan law allowing special commission to investigate labor disputes and to thereafter make non-binding recommendations to the parties is preempted by federal labor law).

The only court of appeals decision which does not squarely follow this line of authority is *Amalgamated Transit Union, Division 819 v. Byrne*, 568 F.2d 1025 (3d Cir. 1977), in which the court held that when a state acts as a consumer rather than an observer or mediator (in *Byrne*, the State was subsidizing private bus companies), it has the right to say that it will not contribute its resources if the wage settlement is above a certain amount. *Byrne* did not reject the preemption cases we have cited above; it distinguished them, stating that "New Jersey has merely established conditions on how it will spend its own money to insure that transportation services are provided to the public." *Byrne, supra*, 568 F.2d at 1030.

All the court of appeals decisions which are on point conclude that action by a state agency which interferes with the collective bargaining process by suggesting the outcome is preempted.

**C. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INVOLVEMENT OF STATE AND LOCAL REGULATORY AGENCIES IN THE CONGRESSIONALLY CREATED AND PREEMPTED COLLECTIVE BARGAINING PROCESS.**

The decision below resolves, without any analysis, significant questions as to the proper role of state regulatory agencies in affecting the labor-management relations scheme

created by Congress. Although this Court has previously addressed these issues in the context of state regulation of antitrust laws and laws that deal primarily with labor relations and labor disputes, the Court has not yet had occasion to direct itself to the proper role of state regulatory agencies that deal primarily with utility regulation or consumer protection in affecting the labor-management relations scheme created by Congress.

Due to ever-increasing costs of producing and delivering to commercial and residential users energy, telephone service, water, transportation services, and other resources and services, there has been, and continues to be, closer scrutiny of utility rates. The impending break-up of AT&T will intensify that trend; predictions already abound that telephone service rates will increase. Thus, labor, management, state and local officials, and the consumer require guidance as to the extent to which state regulatory agencies may determine, through the setting of rates, acceptable wage and benefit levels rather than leave those determinations to free and unhindered collective bargaining.[3] Among the questions as yet unanswered are:

(1) Assuming that the regulation of utility rates is an interest "deeply rooted in local feeling and responsibility," *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), in regulating those rates may states regulate

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[3]The same guidance would be required were the trend pro-labor rather than pro-consumer. It is conceivable that a pro-labor majority on a state regulatory commission might adopt a projected reasonable level of wage increase higher than that which the regulated employer deemed appropriate. The effect would be to hinder the employer's ability freely to negotiate an appropriate wage and such a decision would be equally violative of the congressionally created and preempted labor-management relations scheme.

as well the substantive terms of collective bargaining agreements covering the utility companies' employees?

(2) May a state properly regulate purely local interests through laws of general application in such a manner that the regulation conflicts with a federal statutory scheme? *Cf. New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 545 (1979).

(3) If a state regulatory agency is permitted to determine the substantive terms of a collective bargaining agreement, what is the proper role of the employer and the union in the collective bargaining process as envisioned by Congress? Does the regulatory agency become the agent of the employer for purposes of economic pressure and the filing of charges of refusal to bargain in good faith? 29 U.S.C. § 158(a)(5). And what are the collective bargaining rights and duties of the employer and the union after the regulatory agency issues its determination?

Because the trend to affect the wages and benefits of utility company employees in the name of consumer protection already exists and is likely to intensify, the Court should review the decision below so as to provide guidance to labor, management, state and local officials, and the consumer as to the proper role of state and local agencies in regulating matters intentionally left unregulated in the congressionally created and preempted collective bargaining scheme.

**Conclusion.**

For these reasons, a writ of certiorari should issue to review the decision of the Public Utilities Commission of the State of California.

Respectfully submitted,

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*Local Union No. 47,*
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## EXHIBIT A.

### Decision.

Decision 82-12-055 December 13, 1982

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY for authority to increase rates charged by it for electric service.

Application 61138. (Filed December 18, 1981).

3. *Labor Escalation Issues*

For the calculation of labor costs, both Edison and the staff have used a 9% escalation rate for 1982, based on Edison's recent wage agreement with its union employees. Edison has used the 9% rate for all its employees; the staff, however, has recommended that the recognized increase in wages for all nonunion employees be limited to 5%, rather than escalating them on the basis of the union contract.[5]

Staff's recommendation is based on the staff's judgment of the current economic situation. The staff believes that it is inappropriate for Edison's nonunion employees to receive any higher rate of increase in light of the current economic climate of high unemployment, declining inflation rates, and limited salary increases in private industry. The staff supported its position with six newspaper articles which describe wage concessions and layoffs in various industries. The articles include reports on the wage concessions made by union and in some cases, nonunion, employees in return for certain concessions from employers, such as guarantees

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[5]The staff did not restrict wage increases for union employees because of its uncertainty of the Commission's authority to do so. In the staff brief, staff cites legal authority which appears to support a limitation on union wage increases for ratemaking purposes.

of job security or granting higher than normal increases when the economy improves.

The staff's adjustment to nonunion wages and salaries was not contained in the figures shown in Exhibits 43 and 44, its Report on Results of Operations; therefore, it is not broken down by expense accounts but is treated as a lump sum adjustment. Based on staff's estimate of the rate of inflation in 1982 and 1983 the adjustment would amount to $7.2 million for system expenses and $6.8 million for Commission jurisdictional revenue requirement in 1983. The 5% wage increase limitation on nonunion wages would affect all accounts which contain nonunion labor expense. The nonunion payroll amounts to 43.6% of Edison's total labor expenses. Under the staff proposal, Edison could either implement the 5% limitation, or its stockholders could absorb any increase over the limit that Edison's management might see fit to pass on to the nonunion employees. To implement the 5% limitation, Edison would have to ask nonunion employees to accept a 5% wage increase limitation during 1982 and 1983 at the same time union employees are receiving a 9% wage increase for 1982 and a 6.4% increase for 1983. The staff recommendation makes no provision for Edison to make any concessions to labor similar to those described in the articles cited by the staff.

The staff's recommendation assumes that the 5% limitation is in full effect for all of the year 1982. Edison's salary planning for 1982 will have been essentially implemented at the time this decision is issued, making it difficult for Edison's management to implement the 5% limitation in 1982. The alternative would be to implement staff's $7 million nonunion wage limitation proposal solely in 1983. This would require Edison's 6,500 nonunion employees to accept near-zero wage increase at the same time that the 8,500 union employees would be receiving a 6.4% increase.

The real world effect of the staff proposal to impute the 5% limitation to 1982, if we were to adopt it for rate setting, would be to deny the inclusion of any nonunion wage increase in the revenue requirement for 1983, while at the same time passing through a 6.4% union wage increase to the ratepayers.

Edison introduced the testimony of a compensation and human resource management consultant who described the impact of staff's recommendation on the company. In Exhibit 140, he offered the opinion that:

1. Staff's reliance on wage concessions made in other industries is not relevant to the electric utility industry.
2. Current levels of unemployment are not high in the electric utility industry; therefore, in order to remain competitive Edison must achieve wage parity with other utilities.
3. Limitations on nonunion wage increases are inequitable and will cause compression between classes of employees.

We perceive a number of infirmities in the staff's nonunion wage limitation proposal, among them:

1. It unnecessarily distinguishes union and nonunion employees. Staff did not find the wage increase for union employees to be unreasonable. It is therefore difficult to understand why a similar increase to nonunion employees is unreasonable.
2. The selection of a 5% wage increase is not well-supported in the record.
3. If implemented by Edison, the wage limitation could lead to internal pay inequities, increased turnover of employees and difficulty in recruiting talented individuals.

We will not adopt the staff's nonunion wage limitation proposal. The record is clear that it is currently reasonable for Edison to afford its nonunion employees the same percentage increase as Edison under contract will pay its union employees.

For 1983 we have adopted union and nonunion labor escalation rates of 6.1%, which are obtained using the staff's method of calculating its 6.4% union labor escalation rate, but incorporating the fall 1982 DRI forecasts. We believe that this is a more reasonable estimate of inflation based on current and expected trends in the next year.

4. *Adopted Escalation Rates*

Although both based their projections on DRI forecasts, Edison and the staff differ in the general economic conditions each has assumed in arriving at its recommended escalation rates. Edison's assumptions are the more pessimistic. This results in a difference between their estimated jurisdictional test year 1983 figures for revenue requirement of $21.9 million for all accounts, not including the effect of the staff recommendation to limit nonunion labor costs to 5% annual escalation. The effect of this proposed limitation on nonunion wages increases this difference to $28.7 million.

Table IV-2 shows a comparison of the escalation rates proposed by Edison and the staff, together with those we have adopted for purposes of this proceeding. The rates we have adopted generally follow the methodology proposed by the staff but are based on DRI's fall 1982 Trendlong forecast. We are not adopting the staff's recommendation to limit the escalation of nonunion labor costs to 5% for both 1982 and 1983 as already discussed. Reliance on fall rather than summer data results in a reduction of $7.05 million in 1983 revenue requirements.

## EXHIBIT B.

### Order Denying Rehearing of Decision.

Decision 83-03-061

Before the Public Utilities Commission of the State of California.

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY for authority to increase rates charged by it for electric service.

Application 61138. (Filed December 18, 1981).

*ORDER DENYING REHEARING OF DECISION 82-12-055*

Petitions for rehearing of Decision 82-12-055 have been filed by the International Brotherhood of Electrical Workers, Local 47 and the California Community and Junior College Association.

We have carefully considered each allegation of error in the petitions and are of the opinion that good cause for rehearing has not been shown. Therefore,

IT IS HEREBY ORDERED that rehearing of Decision 82-12-055 is denied.

The effective date of this order is today.

Dated March 16, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

## EXHIBIT C.

### Order.

S.F. No. 24551.

In the Supreme Court of the State of California in Bank.

Local Union No. 47, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner, v. The Public Utilities Commission, Respondent; Southern California Edison Co., Real Party in Interest.

Filed: July 27, 1983.

Petition for writ of certiorari DENIED.

Bird, C.J., is of the opinion that the petition should be granted.

/s/ Bird
*Chief Justice*